No. 44731-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Larry Stigall,

Appellant.

Clallam County Superior Court Cause No. 13-1-00040-6

The Honorable Judge S. Brooke Taylor

Appellant's Opening Brief

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1. Mr. Stigall's conviction violated his Fourteenth Amendment right to due process.

2. The trial court erred by finding the permanent *ex parte* protection order valid.

3. The trial court erred by allowing the prosecution to introduce the invalid protection order into evidence.

> **ISSUE 1:** A person may not be convicted of assault in violation of a protection order unless the trial judge first determines that the protection order was valid at the time of the offense. Here, the issuing court was not provided proof of service, but nonetheless entered a permanent protection order, placing the burden on Mr. Stigall to schedule a court hearing if he wished to contest it. Was Mr. Stigall's conviction based on an invalid protection order issued without lawful authority?

4. Mr. Stigall's conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.

5. The trial court erred by denying Mr. Stigall's motion to exclude evidence of prior misconduct.

6. The trial court should have excluded prior allegations of misconduct, introduced by the state to show Mr. Stigall's propensity to commit acts of domestic violence.

7. The trial court misinterpreted ER 404(b).

8. The trial court failed to apply the four step procedure required for admission of prior bad acts evidence under ER 404(b).

> **ISSUE 2:** A criminal conviction may not be based on propensity evidence. In this case, the jury heard evidence that Mr. Stigall had violated the protection order many times. Did Mr. Stigall's conviction violate his Fourteenth Amendment

right to due process because it was based in part on propensity evidence?

ISSUE 3: ER 403 and ER 404(b) prohibit introduction of evidence of prior uncharged misconduct, except in limited circumstances. Here, the court denied defense counsel's motion to exclude evidence that Mr. Stigall had violated the protection order on prior occasions. Did the trial court err by admitting evidence of prior misconduct?

9. The trial court commented on the evidence in violation of Wash. Const. art. IV, § 16.

10. The trial judge inappropriately communicated his view that White was the "victim" of an offense.

11. The trial court erred by giving Instruction No. 11.

ISSUE 4: A trial judge may not comment on the evidence. Here, the trial court's instructions communicated a belief that White was the "victim" of an offense. Did the trial judge improperly comment on the evidence in violation of Wash. Const. art. IV, § 16?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Larry Stigall and Tammy White had a relationship from 2004 to 2009. RP 37-38. White sought a protection order in September of 2012. Ex. 1. An *ex parte* order was entered, and then reissued because the court did not have proof that Mr. Stigall had been served. Ex. 9.

A hearing was held on October 12, 2012. The court had no proof that Mr. Stigall had been served with notice of the hearing. Ex. 1. The court entered an order, but did not check the box indicating that Mr. Stigall had been served. Ex 1. Instead, the commissioner wrote: "Sheriff will serve to Respondent in jail. If Respondent wants a hearing, he can schedule one and court will review de novo." Ex. 1, p. 3. The order purported to remain effective "for one year from [October 12.]"

White complained that Mr. Stigall violated this order several times. RP 36-62. She contacted police more than once, and eventually Mr. Stigall faced a charge of Assault in Violation of a Protection Order. CP 19-20; RP 36-32, 75-84 .

At trial, the state offered Exhibit 1. RP 30, 33, 50. Mr. Stigall objected. He argued that the order was invalid on its face. RP 63-65, 86-94, 104-116.

The state also offered Exhibit 3, a return of service document. Exhibit 3 was not filed until four days after entry of the restraining order (Ex. 1). The return of service was signed by a person other than the one who had allegedly served Mr. Stigall. Ex. 3. The court admitted both documents into evidence. RP 50, 65.

Mr. Stigall moved to dismiss the charge for insufficient evidence. The court denied his motion. RP 89-96, 103-119.

The trial judge ruled admissible prior incidents where White alleged that Mr. Stigall had violated the order. The court gave a limiting instruction:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of other instances of alleged violations of a protection order and may be considered by you only for the purpose of showing knowledge, intent, a cimmon scheme or plan, or assessing the credibility of the victim. You may not consider it for any other purpose. Any discussion of the evidence furing your deliberations must be consistent eith this limitation. CP 45.

Following conviction, Mr. Stigall timely appealed. CP 5-18.

ARGUMENT

I. THE COURT ERRED BY FINDING THE PROTECTION ORDER VALID

A. Standard of Review.

The validity of an order of protection is a question of law. *State v. Miller*, 156 Wn.2d 23, 32, 123 P.3d 827 (2005). Questions of law are reviewed *de novo*. *In re Estate of Langeland*, 67255-0-1, --- Wn. App. ---, 2013 WL 5787458 (Oct. 28, 2013).

B. The protection order was invalid because the issuing judge was not provided proof of service until after its entry.

A person cannot be convicted of violating an invalid protection order. *Miller*, 156 Wn.2d at 32. The validity of the order is not an element of the offense. *Id.* Instead, the trial court acts as a gatekeeper and must exclude a legally invalid order. *Id.*

Here, the protection order is invalid on its face. It is invalid because the issuing judge lacked authority to enter the order. The trial court should not have admitted the invalid order into evidence over Mr. Stigall's objection.

A protection order is not valid unless the respondent receives timely notice of the hearing:

> ... no order for protection shall grant relief to any party except upon notice to the respondent and hearing pursuant to a petition or

> counter-petition filed and served by the party seeking relief in accordance with RCW 26.50.050.

RCW 26.50.060(5). The respondent must be personally served "not less than five days before the hearing." RCW 26.50.050. If the respondent is not timely served, the court has no authority to issue a permanent order. Instead, the court may issue a temporary *ex parte* order pursuant to RCW 26.50.070. An *ex parte* order expires after fourteen days. RCW 26.50.070(4).

Here, the permanent protection order was not valid. At the time the order was entered, the issuing court had no proof of service. Ex. 1. Absent proof of service, the court possessed only the authority to enter an *ex parte* order for a maximum of fourteen days. RCW 26.50.070(4). The issuing court did not do this. Ex. 1. Instead, it purported to issue a permanent *ex parte* order. Ex. 1.

Such an order is not authorized by the statute. RCW 26.50.060. Nor does the statute authorize the court to place the burden upon the respondent to schedule a hearing to contest a permanent order. RCW 26.50.050.

The invalidity is not cured by the late-filed proof of service. First, the document filed to prove service is of questionable validity. It is signed

by someone other than the person who claims to have served Mr. Stigall. Ex. 3.

Second, the court has authority to grant relief only "[u]pon notice and after hearing." RCWA 26.50.060(1). The statute explicitly prohibits relief "except upon notice to the respondent and hearing pursuant to a petition or counter-petition filed and served by the party seeking relief in accordance with RCW 26.50.050." RCWA 26.50.060(5). Where personal service proves impossible, the court may reissue an *ex parte* temporary order and authorize service by mail or by publication. RCW 26.50.050; RCW 26.50.085; RCW 26.50.123.

Lacking proof of service at the time of the hearing, the court had limited options. It could reissue the *ex parte* temporary order and allow the petitioner to (1) attempt personal service again, or (2) serve by mail or publication, upon proof of the requirements of RCW 26.50.085.

The issuing court lacked authority to enter the permanent protection order. RCW 26.50.050; RCW 26.50.060(5); RCW 26.50.070(4). The trial court erred by permitting the order to go to the jury. *Miller*, 156 Wn.2d at 32. Mr. Stigall's conviction must be reversed and the case dismissed with prejudice. *Id.*

II. THE TRIAL COURT MISINTERPRETED ER 404(B) AND VIOLATED MR. STIGALL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY IMPROPERLY ADMITTING PROPENSITY EVIDENCE.

A. Standard of Review.

The interpretation of an evidentiary rule is a question of law, reviewed *de novo*. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the rule has been correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). Reversal is required if there is a reasonable probability that the improper evidence materially affected the outcome of the case. *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013).

A party whose motion *in limine* is denied maintains a standing objection to the challenged evidence, which preserves the issue for appeal. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010).

B. The court erred by permitting the state to introduce propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.[1] U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau,* 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) ("There is, accordingly, no question that propensity would be an 'improper basis' for conviction…") (citation omitted).

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

> [S]uch evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior "bad acts," may overlook weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover…jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. …[J]urors will credit propensity evidence with more weight than such evidence deserves…[S]uch evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

[1] The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Natali & Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause,* 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In addition to constitutional limitations, the rules of evidence prohibit the introduction of propensity evidence. Under ER 404(b), "[e]vidence of other… acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against prejudicial the danger of unfair prejudice.[2] *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

A trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." *DeVincentis*, 150 Wn.2d at17-18. The state bears a "substantial burden" of showing admission is appropriate for a purpose other than propensity. *DeVincentis,* 150 Wn.2d at 18-19. Prior to the admission of misconduct evidence, the court must

[2] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

(1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Fisher*, 165 Wn.2d at 745. Doubtful cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson,* 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

Here, the trial court misinterpreted ER 404(b), abused its discretion, and infringed Mr. Stigall's Fourteenth Amendment right to due process by denying his motion to exclude propensity evidence. Over Mr. Stigall's objection, the court allowed the state to introduce multiple allegations of no contact order violations.[3] RP 43, 51-53, 68-71, 81. When one witness testified that there were "so many" violations of the order, the court overruled Mr. Stigall's objection and refused to strike the testimony. RP 72. In addition, the court admitted photos of damage Mr. Stigall had allegedly caused to White's mailbox. RP 52-53; Ex. 8.

The evidence should not have been admitted.

The court's decision admitting the evidence was based on an erroneous interpretation of the law. The court took an improperly broad

[3] Two of which occurred after the conduct for which Mr. Stigall was charged in this case.

view of ER 403 and ER 404(b). Contrary to the trial court's belief, domestic violence cases are not "very different and very unique" when it comes to the admission of evidence under ER 403 and ER 404(b).[4] RP 28. There is no basis to interpret the rules differently in domestic violence cases.

The court also failed to follow steps two, three, or four of the procedure outlined above. *Fisher,* 165 Wn.2d at 745.

1. The prior acts were not admissible for any legitimate purpose.

The court did not identify a legitimate purpose for admission of the evidence. The court's first purported reason for admitting the evidence was to establish a common scheme or plan. RP 29. The Supreme Court has called for caution in applying the common scheme or plan exception. *DeVincentis,* 150 Wn.2d at 18-19. Erroneous admission requires reversal whenever it is reasonably probable that the error materially affected the outcome of the trial. *Wilson,* 144 Wn. App at 178.

[4] Under limited circumstances, evidence may be admissible under ER 403 and ER 404(b) to explain a DV victim's delay in reporting or decision to remain with a batterer. *See, e.g., State v. Ciskie,* 110 Wn.2d 263, 276, 751 P.2d 1165 (1988) (addressing admission of expert testimony). Mr. Stigall's case did not present such circumstances.

Common plans fall into two distinct categories. The first is where multiple acts, including the crime charged, are part of a larger overarching criminal plan.[5] The second category involves a single plan that is "used repeatedly to commit separate, but very similar, crimes." *DeVincentis,* 144 Wn. App. at 19. Only this second type of plan is relevant here.

Evidence of this second type of plan requires the state to establish "[a] high level of similarity… 'the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.' …[T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial." *DeVincentis,* 150 Wn.2d at 19-20 (quoting *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)). Furthermore, the prior misconduct must show a "'strong indication of a design (not a disposition).'" *Lough*, 125 Wn.2d at 858-859 (quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 375, at 335).

The words 'scheme,' 'plan,' and 'design,' suggest that admissibility requires some degree of premeditation. In keeping with this

[5] For example, when a person steals a weapon for use in a robbery, the theft is part of a larger plan.

requirement, the proponent of the evidence must show that the accused person had the overall intent to commit a particular crime on multiple occasions and repeatedly used a particular method of accomplishing that goal.

Here, there is no indication that Mr. Stigall had an overall general plan. The prior acts suggest a similarity of results, rather than a "general plan." *Lough*, 125 Wn.2d at 860. The misconduct establishes a disposition, not a design, and should have been excluded under ER 404(b).

The second purpose identified by the court was "modus operandi." RP 29. But *modus operandi* is a theory used to establish identity, where the criminal act is characterized by a unique signature associated with the accused person. *See, e.g., State v. Fualaau*, 155 Wn. App. 347, 357, 228 P.3d 771 (2010) ("The critical determination for the trial court to make is whether there are sufficient similarities between the crimes to make evidence of the prior crime probative of the defendant's identity as the perpetrator of the crime charged.") Mr. Stigall's identity was not at issue in this case. Nor does it make sense to speak of *modus operandi* in cases involving a protection order violation, where the crime may only be committed by persons restrained by the protection order. RCW 26.50.110.

Finally, the court suggested that the prior acts were admissible to prove "the credibility of the victim…" RP 29. This case did not involve a

recanting victim, a delay in reporting, or an inexplicable relationship that persisted despite repeated incidents of domestic violence. *Cf. State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (recanting victim). Instead, the prior acts could only bolster White's credibility through an impermissible inference of propensity: that White's accusation was credible because Mr. Stigall had a propensity to violate the protection order.

None of the purposes mentioned by the court justify introduction of the evidence under ER 404(b). The court did not identify a legitimate purpose for admission of the evidence. Mr. Stigall's conviction must be reversed and the case remanded with instructions to exclude evidence of the prior acts. *Fisher,* 165 Wn.2d at 745.

2. The prior acts were not relevant to prove an element of the offense.

In discussing relevance, the court mentioned both "knowledge" and "intent." RP 28-29. Intent is not an element of the offense. RCW 26.50.110. None of the prior acts were relevant to prove Mr. Stigall's knowledge of the order.

The court also stated that the prior acts were "part of the crime" and/or "element[s] of the crime." RP 28. This is incorrect: the state was not required to prove any prior acts to obtain a conviction. Instead, the

state was required to prove the existence of a valid protection order, knowledge of the order, and an assault in violation of that order. RCW 26.50.110. The court's assertion that the evidence was necessary to prove "the crime itself" suggests impermissible reliance on an inference of propensity: that Mr. Stigall committed similar crimes in the past, and thus was likely guilty of the charged crime. RP 29.

Nor does it make sense to say that the relationship between Mr. Stigall and White was "the setting in which the criminal acts are alleged to have occurred." RP 28. To the extent the relationship was characterized by prior acts of domestic violence, the "setting" of the crime is nothing more than another word for Mr. Stigall's propensity.

The evidence was not relevant to prove an element of the offense. Mr. Stigall's prior acts should not have been introduced into evidence. His conviction must be reversed and the case remanded for a new trial. *Fisher,* 165 Wn.2d at 745.

3. The trial court failed to properly balance prejudice against probative value.

Evidence must be excluded whenever its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The risk that jurors will improperly use evidence of prior bad acts as propensity evidence is great. Here, the trial judge mentioned the generic

prejudice inherent in the admission of prior misconduct, but did not specifically weigh the particular evidence here against its probative value, as required under the rule. RP 28-29.

The court infringed Mr. Stigall's due process rights, misinterpreted ER 403 and ER 404(b), and abused its discretion by admitting propensity evidence. *Thang*, 145 Wn.2d at 642. Mr. Stigall's conviction must be reversed, and the case remanded for a new trial. *Id.*

III. THE COURT MADE AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, No. 85367–3, 291 P.3d 876 (2012). Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

B. The court's reference to White as "the victim" conveyed a personal attitude toward the evidence against Mr. Stigall.

Under art. IV, § 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Art. IV, § 16. A comment on the evidence "invades a fundamental right" and may be challenged for the first time on

review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. *Id.*

A judge can neither convey a personal attitude nor instruct jurors that factual matters have been established as a matter of law. *Levy*, 156 Wn.2d at 721. The comment need not be expressly made; it is sufficient if it is implied. *Id.* A statement is a judicial comment if the court's attitude can be inferred. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *accord State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

In Mr. Stigall's case, the court referred to White as the "victim" in its instructions to the jury. CP 45. Whether White was the victim of a crime, however, was a factual question for the jury. The court's use of the word "victim" impermissibly conveyed a personal attitude about the evidence against Mr. Stigall. *Levy*, 156 Wn.2d at 721.

The court impermissibly commented on the evidence in violation of art. IV, § 16. The state cannot show that no prejudice could have resulted from this violation. *Id.* at 725. Mr. Stigall's conviction must be reversed. *Id.*

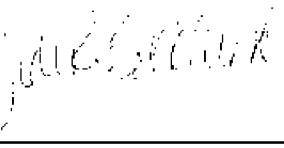
CONCLUSION

The court erred by admitting a protection order that was invalid on its face. The court misinterpreted the law, infringed Mr. Stigall's right to due process, and abused its discretion by admitting evidence of prior bad acts. The court impermissibly commented on the evidence by referring to White as "the victim" in its jury instructions.

Mr. Stigall's conviction must be reversed. The case must be remanded and the charge dismissed. In the alternative, the case must be remanded with instructions to exclude evidence of prior bad acts.

Respectfully submitted on November 7, 2013,

BACKLUND AND MISTRY



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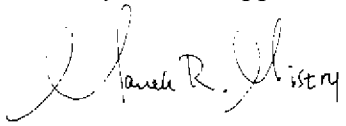

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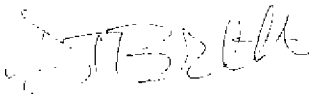

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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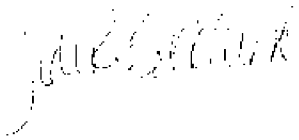
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 7, 2013.



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